IN THE

Supreme Court of the United States

October Term, 1946

No. 400

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Petitioner

v.

UNITED STATES OF AMERICA

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER

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St. Paul, Minn.,
November 12, 1946.

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OPINIONS BELOW

The opinion of the District Court, Western District of Wisconsin (R. 7-18) is reported in 64 F. Supp. 1. The opinion of the Circuit Court of Appeals for the 7th Circuit (R. 43-48) is reported in 156 F. (2d) 346.

JURISDICTION

The judgment of the District Court was entered February 21, 1946. (R. 36) The judgment of the Circuit Court of Appeals, affirming the judgment of the District Court, was entered July 8, 1946. (R. 49) Petition for certiorari was filed in this Court on August 14, 1946, and was granted October 14, 1946. (R. 49)

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938.

QUESTION PRESENTED

The question presented is whether any of the following described shipments were "military or naval property of the United States moving for military or naval and not for civil use", within the meaning of Section 321 (a), Title III, Part II, Transportation Act, 1940, 49 U. S. C. 65(a):

(a) Copper cable shipped in August 1941 for use in installing degaussing equipment (to neutralize magnetic mines) in a cargo vessel being constructed by Seattle-Tacoma Shipbuilding Corporation under contract with the Maritime Commission.

(b) Lumber shipped in January and February 1943 for use by contractors in construction of an ordnance plant for the manufacture of ammunition under contract with the War Department.

(c) Lumber shipped in May 1943 for use by Crown Iron Works in manufacturing members of pontoon bridges to

move military personnel across water barriers, under contract with the Marine Corps.

(d) Bowling Alley Outfits shipped in February 1942 to Siems-Drake, Puget Sound Company, Seattle, contractors, for installation in a recreation center being constructed under contract with the Navy, for use initially by civilian employees of the contractor, and later by military personnel, at Dutch Harbor, Alaska.

(e) Liquid paving asphalt shipped in January 1942 to Civil Aeronautics Administrator for use by a contractor in constructing runways in an airport at Cold Bay, Alaska, on land reserved by Executive Order for use by the Navy.

STATUTES INVOLVED

Northern Pacific Railroad Company, Petitioner's predecessor in interest, was organized by Act of Congress, July 2, 1864, 13 Stat. 365, and received a grant of lands in aid of construction by that Act, and an additional grant in aid of additional construction by Joint Resolution of May 31, 1870, 16 Stat. 378. (R. 20)

The Act and Joint Resolution imposed certain transportation obligations with respect to property and troops of the United States, which, by the Army Appropriation Act of June 7, 1924, (10 USC Sec. 1375), were fixed at not more than 50 percent of commercial or tariff rates. A history of land grant legislation may be found in *United States v. Union Pacific R. Co.*, 249 U. S. 354.

Section 321 (a) Transportation Act, 1940, modified the transportation obligations of land grant railroads by pro-

viding that full commercial rates shall be paid for transportation of any property for the United States, or on its behalf, "except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty;" * * *. Section 321 (b) provides that if any railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of land from the United States to aid in the construction of any part of the railroad operated by it, reduced rates shall continue to apply as though subsection (a) had not been enacted, until such carrier shall file with the Secretary of the Interior a release of any claim it may have against the United States to additional lands or compensation for such lands. Section 322 provides for prompt payment of transportation bills as presented, without audit, and deduction of any over-payments found to have been made from amounts subsequently found due the carrier. Sections 321 and 322 are copied in Appendix "A", page 31.

STATEMENT

This action was brought under the Tucker Act, 28 USCA Sec. 41 (20) to recover a balance of freight charges on the five shipments above described. Bills were presented at tariff rates. The Government deducted the difference between the tariff rate and land grant rate from the original or subsequent freight bills, claiming that the shipments were military or naval property for miltary or naval use, entitled to land grant rates.

Stipulated facts were adopted by the District Court as Findings of Fact. (R. 18 et seq.)

Transportation Act, 1940, was enacted September 16, 1940. At that time there was pending in this Court, *United States v. Northern Pacific Railway Company,* decided December 16, 1940, 311 U. S. 317. That action was brought by the United States pursuant to the Act of Congress of June 25, 1929, (46 Stat. 41) expropriating all lands within the limits of the Northern Pacific grant which had been placed in forest reserves, directing the Attorney General to bring suit to adjust the grant, and providing for payment to the Railway Company of just compensation for expropriated lands to which it might be found entitled. In that suit the Company had been adjudged by the District Court to be entitled to patents for some 428,986 acres outside the limits of the forest reserves, of the estimated value of approximately $1,400,000; and to compensation for 1,453,061 acres of expropriated lands which it claimed in said suit to be of the value of $14,468,649. (Findings of Fact, R. 23) It was release of these claims to which Section 321 (b) has particular reference. This Court affirmed the decision of the District Court

that Petitioner was entitled to patents to the 428,986 acres outside the forest reserves and remanded the case for further proceedings respecting Petitioner's claims to compensation for expropriated lands. (R. 23)

Thereafter, in order to entitle itself to the benefit of Section 321 (a), Petitioner duly released, pursuant to Section 321 (b), its right to receive patents for the lands adjudged to it, and its claim for compensation for the expropriated lands, and judgment was entered accordingly in that suit. (R. 23)

Controversy having arisen as to the extent of the government's right to land grant rates under the exception contained in Section 321 (a), Petitioner brought this suit as a test case to obtain an authoritative determination of certain of the questions which had arisen.

The District Court held, (R. 17), that each of the above described shipments was military or naval property of the United States moving for military or naval and not for civil use within the meaning of Section 321 (a) and entered judgment dismissing this suit. The Court of Appeals for the Seventh Circuit affirmed. Its decision is summarized in the following quotation from its opinion:

> "Any property the Government used to forward its total war effort was military or naval property, and if owned by the Government and transported over land grant railways, it was the kind of property Congress did not release from the low rates granted by the land grant railways." (R. 48)

SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Seventh Circuit erred:

1. in holding that the United States was entitled to land grant rates on all or any of the shipments of government property above described;

2. in holding that each of said shipments was military or naval property within the meaning of the exception in said Sec. 321 (a) Transportation Act, 1940;

3. in holding that each of said shipments was moving for military or naval and not for civil use within the meaning of said exception; and in holding that "this exception was for the benefit, not of the railroads, but of the United States, and will be liberally construed to carry out the intention of Congress";

4. in holding that "any property the Government used to forward its total war effort was military or naval property, and * * * was the kind of property Congress did not release from the reduced rates granted by the land grant railways."

ARGUMENT

I

MATERIALS MOVING FOR USE IN CONSTRUCTION OF PLANTS FOR MANUFACTURE OF MILITARY OR NAVAL PROPERTY OR FOR USE IN THE MANUFACTURE OF SUCH PROPERTY, ARE NOT WITHIN THE FAIR MEANING OR INTENDMENT OF THE PHRASE, "MILITARY OR NAVAL PROPERTY MOVING FOR MILITARY OR NAVAL AND NOT FOR CIVIL USE."

Section 321 (a), Transportation Act, 1940, provides for payment of full commercial rates for transportation, for or on behalf of the government, of any property *except* "military or naval property * * * moving for military or naval and not for civil use." This language is restrictive. It is not of doubtful meaning. Fairly read, it means *articles for use by the armed forces.* It does not include articles moving for *construction or manufacture of facilities or articles ultimately for military or naval use.* Argument is not necessary to demonstrate what is self-evident.

Webster's New International Dictionary, 2nd Edition, unabridged, defines the words "military" and "naval" as follows:

> "Military"—"of or pertaining to soldiers, arms or war; belonging to, engaged in, or appropriate to the affairs of war; according to the methods and customs of war or armies";
>
> "Naval"—"of or pertaining to ships or shipping; of or pertaining to or connected with, possessing or characteristic of vessels of war or a navy".

Black's Law Dictionary, 2nd Edition, at page 778, defines "military" as "pertaining to war or to the army; concerned with war".

Copper wire, lumber, bowling alley outfits and liquid paving asphalt are not themselves military or naval articles. As such, they do not "pertain to soldiers, arms or war", nor do they "belong to the affairs of war." It is only such things as are furnished to the armed forces *for their use* that are military or naval property. *None of the shipments were so made or used.*

Manufacture and construction are civilian pursuits. From time immemorial, the armorer's trade has been a civil occupation. Materials, parts, ingredients, tools and machinery employed in production, manufacture or construction are devoted to civil uses. Such civil uses are not converted into military or naval uses by the fact that articles manufactured or produced thereby subsequently may be used for a military purpose.

The use made of *completed things* is obviously unrelated to the *processes involved in their construction or manufacture.* In the construction of a merchant ship, for example, the use made of materials, tools, machinery and men are the same whether the ship is intended for civil use or for military use. The use made of the *ship* is not a use *of the materials* composing it, for the materials are not a ship nor useable as such and the identity of the materials is merged in the ship. The machinery and tools were never any part of the ship.

Nor is the civil nature of the use made of materials and parts in construction or manufacture altered by the fact that the work is done under contract with the United States,

with materials procured and furnished to the contractor by the government. For the essential nature of the work must remain the same whether it is carried on by the government through civilian contractors or is wholly a matter of private enterprise.

The general understanding that the words "military or naval property", even if standing alone, would not be sufficient to cover things merely for use in the manufacture of arms and munitions is evidenced by an opinion rendered by Attorney General Palmer to the Secretary of State on March 3, 1920 (32 Op. 132), which has guided Congress in framing subsequent legislation. A Joint Resolution of Congress, approved March 14, 1912, and an Act of Congress, approved June 15, 1917, forbade the exportation of "arms and munitions of war" to any American country in which the President should proclaim that conditions of domestic violence existed. By Presidential Proclamation issued July 12, 1919, the existence of such conditions in Mexico was proclaimed and all persons were admonished to abstain from violation of the provisions of the Joint Resolution and Act of Congress thereby made applicable to Mexico. The question presented to Attorney General Palmer was whether those restrictions extended to machinery to be purchased in the United States and exported to Mexico for use in a factory there to be constructed and operated for the manufacture of arms and ammunition. In ruling that the Proclamation did not cover the exportation of such machinery, he said:

> "The nature of these provisions is such that they should be properly restricted to such articles as the ordinary signification of the terms used would cover. I do not think that machinery to be used in the construction of

a plant for the production of arms and munitions of war in Mexico would constitute an exportation of such arms and munitions within the fair construction of the language." (32 Op. 132, 134)

In much war legislation enacted contemporaneously with Transportation Act, 1940, Congress, being obviously guided by Attorney General Palmer's opinion, took pains to make express mention of "parts, ingredients, machinery, tools, materials, and supplies necessary for the production or manufacture of military or naval property" whenever it intended its legislation to cover such items. Thus, the Act of July 2, 1940, "to expedite the strengthening of the national defense", C. 508, Sec. 6, 54 Stat. 712, 714, provided that:

> "Sec. 6. Whenever the President determines that it is necessary in the interest of national defense to prohibit or curtail the exportation of any military equipment or munitions, *or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof,* he may by proclamation prohibit or curtail such exportation, except under such rules and regulations as he shall prescribe. * * *" (Italics ours)

By the Act of November 30, 1940, C. 926, 54 Stat. 1220, Congress amended the Anti-Sabotage Act of April 20, 1918, by adding at the end thereof certain additional sections including the following:

> "Sec. 4. That the words 'national-defense material', as used herein, shall include arms, armament, ammunition, livestock, stores of clothing, food, foodstuffs, fuel, supplies, munitions, and all other articles of whatever description *and any part or ingredient thereof,* intended

for the use of the United States in connection with the national defense." (Italics ours)

Congress evidently doubted the sufficiency of the above definition of national defense material, for by the Act of August 21, 1941, C. 388, 55 Stat. 655, it amended the definition by adding thereto the following:

"or for use in or in connection with the producing, manufacturing, repairing, storing, mining, extracting, distributing, loading, unloading, or transporting of any of the materials or other articles hereinbefore mentioned or any part or ingredient thereof."

Again, in the Act of October 16, 1941, C. 445, 55 Stat. 742, Congress authorized the President to requisition for the defense of the United States the property specifically described in the following quotation upon his determination that:

"the use of any military or naval equipment, supplies, or munitions, *or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States.*" (Italics ours)

If the words "military or naval equipment, supplies or munitions" were not broad enough to authorize the President to requisition *parts, machinery, tools or materials necessary for their manufacture,* without express mention of the latter, how can it be supposed that Congress or the railroads considered the exception contained in Section 321 (a) of "military or naval property of the United States moving for military or naval and not for civil use" sufficient to cover such parts, machinery, tools or materials without similar

express mention thereof? If the words "military equipment or munitions" in the Act of July 2, 1940, were thought not sufficient to authorize the President to prohibit or curtail the exportation of "*parts, machinery, tools, material or supplies necessary for the manufacture, servicing or operation thereof*", without express mention, how can the phrase "military or naval property" be thought broad enough to include them? And if the words "national defense material", as broadly defined in the amendment to the Anti-Sabotage Act made by the Act of November 30, 1940, were not broad enough to include articles *for use in or in connection with the producing, manufacturing, etc., of articles intended for the use of the United States in connection with the national defense*, surely the language of the exception contained in Section 321 (a) is not broad enough for that purpose.

The position of the court below that, because war was imminent when Transportation Act of 1940 was passed, Congress must have intended "to save from the release of applicable land grant rates whatever of government property was shipped over land grant railways to be *used* by the United States in its military and naval security program", is as unfounded as it is illogical. If such an intention had existed, apt words, used in other contemporaneous legislation, were at hand to express it. The circumstance that war was imminent and that Congress was engaged in strengthening our defenses, instead of permitting an inference that such an intention existed, repels any such inference, because a desire under those circumstances to rgtain land grant rates for the shipment of *everything useful in connection with the producing, manufacturing or constructing of arti-*

cles and facilities for national defense would most certainly have led to express mention thereof.

Not only did Congress omit mention of "parts, machinery, tools, material or supplies necessary for the manufacture, servicing or operation" of military or naval property, but it deliberately restricted the phrase "military or naval property of the United States" by adding the words "moving for military or naval and not for civil use." If there be ambiguity in the phrase "military or naval property", it is dispelled by these further restrictive words. Any property moving for a civil, rather than a military or naval use is thereby withdrawn from eligibility for land grant rates. Since production, manufacture and construction carried on by civilian contractors and their civilian employees are obviously civil activities, machinery, tools, materials and supplies moving for use in such work are destined for civil use and, as such, *expressly excluded* from the exception, even if the broad sweep of the phrase "military or naval property", standing alone, might otherwise have been thought sufficient to include them.

It is, therefore, most significant that the qualifying words "moving for military or naval and not for civil use" were inserted as the result of compromise between the conflicting views of the House of Representatives, which desired complete repeal of land grant rates, and the Senate, which desired retention of land grant rates for military or naval property. The proposal to except military or naval property from repeal of land grant rates originated long before the war in an amendment reported by Senator Wheeler on April 20, 1938, to S 3876, 75th Cong., Third Sess. (Report No. 1791), which would have amended the bill by adding a

proviso: "that such applicable commercial rate shall not be paid for the transportation of men, officers or personnel in any branch of the military service and *military or naval property.*" When later the bill which became Transportation Act of 1940 (S 2009, 76th Cong., Third Sess.) was pending in Congress, it was amended in the House to include a provision that full commercial rates should be paid for transportation of persons or property for the United States or on its behalf, without exception. This provision was amended in conference by making exception of "military or naval property of the United States moving for military or naval and not for civil use or * * * members of the military or naval forces of the United States (or of property of such members) when such members are travelling on official duty" (House Report No. 2832, 76th Cong., Third Sess., Conference Report to accompany S 2009, pp. 60, 93). Thus, notwithstanding the imminence of war, *the wording of the exception was deliberately made more restrictive than had been proposed by Senator Wheeler back in* 1938.

We respectfully submit, therefore, that the plain meaning of the language used in the military property exception contained in Section 321 (a) confines the application of land grant rates to things shipped for immediate use by the armed forces and does not include materials, parts, ingredients, etc., shipped for use in the construction, manufacture or production thereof. The omission of Congress to include in the exception any mention of such materials and parts, while making express mention thereof in other contemporaneous war legislation, is conclusive evidence of the fact that Congress did not intend to make exception of such articles from the provision for payment of full applicable commercial rates.

II

THE SCOPE OF THE MILITARY PROPERTY EXCEPTION MAY NOT LEGITIMATELY BE EXPANDED BY CONSTRUCTION.

Unless there be ambiguity in the language of the exception, there is no room for construction. In our view, the language of the exception is not of doubtful meaning and is not susceptible of any construction which would encompass the shipments involved in this case. But, if the terms of the exception be deemed ambiguous, every rule of statutory construction forbids expanding its scope beyond what is embraced within the ordinary meaning of the language used.

First: Section 321 was, in the case of Petitioner and other railroads similarly situated, an offer of relinquishment of certain land grant rights of the government in return for releases of claims against the government. Subsection (b) withheld the benefits of Subsection (a) from railroads owning land-aided lines until they should file releases of any unsatisfied land grant claims they might have against the United States. Filing of the required releases constituted acceptance of the offer contained in Subsection (a) and resulted in a contract between the United States and the releasing carrier, amending and modifying its original land grant obligations. *United States v. Northern Pacific R. Co.*, 256 U. S. 51. Unlike the original land grant acts, there was nothing in the nature of a public grant involved in this offer of amendment of the land grant contract. But, even if the proffered relinquishment of the gov-

ernment's rights be viewed as in the nature of a public grant, it is well settled that the rule that public grants are to be construed against the grantee and in favor of the public does not deny to *public offers* a fair and reasonable interpretation or justify withholding that which it clearly appears the grant was intended to convey. See *Russell v. Sebastian*, 233 U. S. 195, 205, where the cases are collected.

Section 321 (a) clearly evidences the intention to give up the right to land grant rates for the transportation of all property except that specifically mentioned in the exception and should be construed accordingly.

Any other rule would make of Government offers traps for the unwary. Petitioner made a very considerable sacrifice in releasing its claims for compensation (aggregating approximately $14,468,649) for the expropriation of indemnity lands in forest reserves within the limits of its grant and in also releasing its claim to patents for other lands worth approximately $1,400,000 to which it had been adjudged entitled by the decision of this Court. In deciding to make this sacrifice, Petitioner had the right to believe that, if it did so, its liability for rate concessions upon the transportation of Government property would thereafter be limited to property falling within the fair meaning of the phrase "military or naval property moving for military or naval and not for civil use." Unless it can be said with assurance that Petitioner would not have made a different decision if Congress had written Section 321 (a) so as expressly to except from the provision for full tariff rates "property moving for military or naval use *or for use in or in connection with the producing, manufacturing or constructing of property for military or naval use and in time of war*

any property for use in forwarding the total war effort", the exception cannot fairly be so construed now. That this would have been a vastly different exception than the exception actually made of "military or naval property moving for military or naval and not for civil use" cannot be doubted. But it is an exact statement of the construction which the courts below have placed upon the latter phrase.

The fact that some land grant roads had no claims against the United States for additional lands or compensation for expropriated lands and hence gave up nothing by the filing of their releases cannot warrant treating Section 321 (a) as a bounty or as a grant without consideration for purposes of interpretation. Congress knew of Petitioner's claims, and the release requirements of Subsection (b) of Section 321 were incorporated in the Act for the very purpose of inducing their relinquishment. It was clearly the intention of Congress by this legislation to obtain, among other results deemed beneficial, the filing of releases considered to be of substantial value to the United States. The character of the legislation as constituting an offer resulting in a contract cannot be affected by the fact that releases made by some railroads were not of substantial value.

Second: The terms of the original land grant obligations extended to the transportation of "any property or troops of the United States." Section 321 (a), in effect, modifies these terms by substituting for the words "any property", the words "military or naval property moving for military or naval and not for civil use." The rule of construction applicable to the original terms must be equally applicable to the modified terms. In construing the terms of the original obligation, this Court said: "It might be very con-

venient for the government to have more rights than it has stipulated for; but we are on a question of construction, and on this question the *usus loquendi* is a far more valuable aid than the inquiry what might be desirable." *Lake Superior and Mississippi Railroad Company v United States*, 93 U. S. 442, 454. Again, in holding that authorized mounts of army officers transported at government expense, pursuant to army regulations, were not "property of the United States" within the meaning of the land grant acts, this Court said: "The terms of the obligation are to be sensibly and fairly read according to the words employed and not expanded or restricted by construction." *United States v Galveston, H. & S. A. R. Co.*, 279 U. S. 401, 404.

In *United States v Union Pacific R. Co.*, 249 U. S. 354, and again in *Southern Pacific Co. v United States*, 285 U. S. 240, this Court had occasion to pass upon the meaning and scope of the phrase "troops of the United States" as used in the land grant acts. In both cases, it gave to this phrase a restrictive meaning. In the *Union Pacific Case*, it held that the word "troops" had at the time of passage of the land grant legislation and had ever since had an established meaning, namely, "soldiers collectively—a body of soldiers", and hence did not include discharged military prisoners, discharged enlisted men, rejected applicants for enlistment, provisionally accepted applicants for enlistment, retired enlisted men or soldiers on furlough. In the *Southern Pacific Case*, it held that, while the test is whether the person to be transported is one of a collective body of soldiers, he must nevertheless, in order to qualify, be travelling for the performance of *a military function;* hence, engineer officers of the army assigned to non-military functions in con-

nection with rivers and harbors work were not "troops of the United States" within the meaning of the land grant acts.

The obvious purpose of Congress in enacting Section 321 (a) was to restrict the application of land grant rates upon property transported for the United States *in the same way that their application to persons transported for the United States had always been restricted.* It would be anomalous to apply a different rule of construction to the restricted provision thus made respecting government property than has always been applied to the restricted phrase "troops of the United States."

Third: It is a cardinal rule that an exception contained in a remedial statute will be strictly construed. *Piedmont & Northern Railway Company v Interstate Commerce Commission,* 286 U. S. 299; *McDonald v Thompson,* 305 U. S. 263; *Gregg Cartage & Storage Co. v. United States,* 316 U. S. 74; *Pennsylvania R. Co. v United States,* 54 F. Supp. 381. In the *Piedmont & Northern Case,* the Court had under consideration a provision contained in Sec. 1 (18), Transportation Act of 1920, excepting certain railroads from requirements of certificates of necessity for extending their lines. The Court said (p. 311-312):

> "The Transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended."

Reference to the report of the House Committee on Interstate Commerce to accompany H. R. 4184, the bill subsequently enacted as Public Law 256, 79th Congress, approved

December 12, 1945, amending Section 321 by eliminating the exception of military and naval property (House Report No. 1408, 78th Cong. Second Sess.) and the debates in Congress on that bill will show that Section 321 was remedial legislation in the highest degree. In the debates in the House of Representatives on H. R. 4184 on May 23, 1944, 90 Cong. Rec. 4970, Congressman Boren said:

> "I should like to make it clear that the idea of repealing land-grant rates did not originate with the railroads. In other words, this is a shippers' bill. The great urge for the enactment of this measure comes from Government authorities having to do with the regulation of transportation and from the important shipping interests of the country."

The results to be achieved from the enactment of Section 321 (aside from obtaining desired releases of claims against the government) were obviously the same as those expected from the enactment of H. R. 4184. As shown by the Conclusion and Recommendation of the House Committee on Interstate and Foreign Commerce, in its report on H. R. 4184 (Appendix "B", infra p. 34), those results were: removal of discriminations under which industries labored in competing for sales to the government; assurance to shippers that the government would bear its fair share of the burden of maintaining adequate systems of transportation; elimination of the necessity for an inordinate amount of accounting and other clerical work in connection with computing the charges on government traffic; removal of the injustice of requiring land grant railroads to continue to make payments on a debt long since extinguished; removal from other carriers of the injustice of being compelled to reduce

their charges on government traffic in order to meet the competition of the land grant lines; and relief of the railroads from uncertainties as to their revenues so as to enable them to plan more intelligently to meet the uncertainties of the future. The main purposes of Section 321 were, of course, to remove discriminations in freight rates between suppliers of the government and to cause the government to assume for the benefit of shippers more nearly its fair share of the transportation burden.

It is not difficult to understand why the retention of land grant rates on military or naval property for military or naval use was not originally thought to interfere substantially with these ends. Competition in supplying the government with articles ready for immediate use by the armed forces could not have been thought extensive, because few are engaged in the manufacture of such articles. But competition between shippers for the furnishing of materials, parts and ingredients, as well as tools and machinery, for the production of facilities and articles ultimately for use by the armed forces could not have been considered inconsequential. When the purposes intended by Congress are thus kept in view, the conclusion that it intended its exception of military and naval traffic to be strictly limited is inescapable.

The holding of the court below that the exception includes "Any property the Government used to forward its total war effort" obviously nullifies in time of war the general provision of Section 321 (a) for payment of full commercial rates, since under conditions of modern warfare nearly all of the activities of the government in time of war are directed in some way to forwarding "the total war effort."

its holding is predicated on the startling and plainly erroneous proposition that *the exception* is to be *liberally* construed because "written for the benefit, not of the railroads, but of the United States." *This treats the exception as though it were the primary purpose of the legislation.* The purpose of the legislation, however, was manifestly *to relinquish rights theretofore possessed,* not to *obtain* rights. The fact that exception was made of certain rights raises no inference that more was intended to be saved than the language of the exception fairly imports. On the contrary, the purpose to make exception obviously called for clear specification of the traffic intended to be excepted.

We submit that the court below clearly erred in holding that the exception of military and naval property should be *liberally* construed to save from the release of applicable land grant rates whatever of government property was shipped over land grant railways to be used by the United States in its military and naval security program. It is *the general provision* for payment of full commercial rates, *not the exception,* that must be liberally construed, for it is the general provision which induced the release of Petitioner's claims and constituted remedial legislation.

III

NONE OF THE SHIPMENTS IN ISSUE WAS A SHIPMENT OF MILITARY OR NAVAL PROPERTY NOR WERE ANY OF THEM MOVING FOR MILITARY OR NAVAL USE.

Examination of the stipulated facts concerning the shipments here in issue, as found by the District Court (R. 24-35), will disclose the unreasonableness of the government's claim that each was a shipment of military or naval property moving for military or naval and not for civil use. In each case, the shipment was of ordinary civilian goods required by a civilian contractor in the performance of a contract to construct or manufacture and deliver a finished thing. Normally, such parts, materials and supplies would be purchased by the contractor and would move as ordinary commercial shipments at applicable tariff rates. No reason is apparent for the purchase and shipment of such parts, materials and supplies by the government except to obtain the benefit of land grant rates if available. Necessary allocations and priorities could be and were arranged to enable government contractors to procure necessary materials and supplies without necessitating the furnishing thereof by the government. It appears that, under the terms of the contract for construction of the Twin Cities Ordnance Plant at New Brighton, Minnesota, title to materials was to vest in the government "when designated by its Contracting Officer, and the Government reserved the right to furnish any materials necessary for the completion of the work" (R. 27). Presumably this was a standard provision of government con-

tracts made on a cost plus basis. The obvious purpose was to enable the government to purchase and ship materials on land grant rates where believed to be available. We turn now to the facts of the several shipments.

Copper Cable (R. 24-26). This shipment was made during the month of August, 1941, some four months before the United States was at war. It was for use by Seattle-Tacoma Shipbuilding Company in connection with the performance of a contract with the Maritime Commission entered into on October 9, 1939, for the construction of a single screw cargo vessel. The ordinary routine provided for by the Merchant Marine Act of 1936 made the plans and specifications for the construction of the ship subject to any changes that might be suggested by the Navy Department to make the vessel suitable for conversion into a military or naval auxiliary in time of war. The need for the copper cable resulted from a determination by the Navy Department in 1940 that the hull of the vessel should have degaussing equipment to neutralize magnetic mines. War was not then imminent, but obviously the use of magnetic mines by nations then at war suggested the advisability of installing degaussing equipment in the hulls of all vessels then under construction by the Maritime Commission. Such provision for protection of a merchant vessel was not more a military or naval measure than would have been the installation of similar protection against icebergs or other perils of the sea. The cargo ship in question was not then being constructed for military or naval use any more than any other vessel constructed in times of peace for the Maritime Commission. Moreover, it does not appear that the cargo ship in question (The S. S. Idaho) was ever used for military

or naval purposes. It was apparently sold by the Maritime Commission (to whom, does not appear) under a contract of sale providing that during the then existing emergency, it should be operated "to and from such port or ports and under such conditions as the Commission shall direct." It was delivered to the purchaser on September 8, 1941, three months before the war, and thereafter operated as directed by the Maritime Commission or War Shipping Administration, but to what service it was assigned is left to conjecture.

If the shipment of copper cable in question was military or naval property moving for military or naval and not for civil use, then any shipment of materials in time of peace for use in the construction of a merchant ship for the Maritime Commission must be equally so.

Lumber for Ordnance Plant (R. 26-29). This shipment moved in January and February, 1942, on commercial bills of lading which were substituted at destination for government bills of lading. The lumber was needed to enable civilian contractors to carry out a subcontract with the Federal Cartridge Corporation of Minneapolis, Minnesota, for the construction and completion of "several large manufacturing buildings with the necessary additional buildings, all of wood construction." The Federal Cartridge Corporation had a cost-plus-fixed-fee contract with the United States to build and operate a plant for the manufacture of ammunition for the armed forces on a site furnished and made available by the government. The Office, Chief of Engineers, issued allocations for the purchase of the needed lumber upon requisitions by the subcontractor who then "issued Purchase Orders to Vendors." The lumber was not

shipped for use by the armed forces nor was it used to make anything for the armed forces. It was moving for use and was used to construct an ordinary building for the government. The construction of that building was no more a military or naval use of the lumber than would be the construction of a building to house the War Department in Washington or the construction of a post office building. The operations carried on within the building after it was constructed were wholly unrelated to the use made of the lumber in the construction of the building.

Lumber for Construction of Pontoons (R. 29). This shipment was made in May, 1943, upon government bill of lading. The lumber shipped was required for performance of a contract between Crown Iron Works and the Marine Corps for the fabrication and furnishing of members of a certain type of demountable floating bridge. What type of contract this was does not appear. The finished balks, sills and chess manufactured by the Crown Iron Works were required by the Marine Corps to move military personnel and vehicles of war across water barriers and obviously were military or naval property moving for military or naval and not for civil use when shipped to the Marine Corps. The lumber, however, was not used or useable by the Marine Corps for military or naval operations. The Marine Corps did not manufacture the balks, sills and chess. The Crown Iron Works did that.

Bowling Alley Outfits (R. 30-32). This shipment moved in February, 1942, on government bill of lading. The bowling alley outfits were required by Siems-Drake Puget Sound Company, Seattle, Washington, for use in connection with the performance of a contract with the Navy for the con-

struction of naval air bases in Alaska. Under the contract, the contractor was permitted to construct "such commissary, recreational, and amusement facilities as may be approved by the Contracting Officer." On account of the unattractive working conditions at the site of these bases in Alaska, it was difficult for the contractor to keep civilian employees on the job. A recreation hall and theater was accordingly projected, with the approval of the Contracting Officer, to serve first as a recreation center for the contractor's men and afterward as a recreational center for military personnel occupying the station. The bowling alley outfits were procured, on the contractor's purchase order, for installation in the recreation center building. The primary purpose for which the shipment moved was to provide amusement facilities for civilian employees of the contractor. Had there been any purpose to provide them for the preservation of the morale of the armed forces to be stationed there, definite provision for the construction of those facilities would have been made in the contract instead of leaving the matter to the election of the contractor. The availability of the recreation facilities for the entertainment of military personnel afterward was clearly an incidental consequence of their construction and not the purpose for which the shipment moved. Bowling alley outfits are not military or naval property and those here in question were moving for use by civilian employees of the Siems-Drake Puget Sound Company, a civil use and not a military or naval use.

Liquid Paving Asphalt (R. 32-35). This shipment moved in January, 1942, on government bill of lading. It moved as an ordinary shipment for construction of a *public* airport by the Civil Aeronautics Administrator. At the time

it moved, a contractor was engaged in stripping and grading operations for the completion of an airport at Cold Bay, Alaska, on public lands reserved since 1929 for the use of the Navy Department, under the program carried on by the Civil Aeronautics Administration with funds appropriated by Congress for "the construction, improvement and repair of public airports and public landing areas in the United States and its territories and possessions, determined by the administrator, with the approval of a Board composed of the Secretary of War, Secretary of the Navy, and Secretary of Commerce to be necessary for national defense". It happened that about four months after the shipment moved, the military situation required the Army to take over the construction of the airport at Cold Bay, and the asphalt was actually used by military personnel in constructing the necessary air strips. We submit, however, that the applicable rate cannot be varied by circumstances arising long after the transportation has been performed. The shipment in question moved for civil use by civilian contractors in the construction of a *public* airport. Neither the fact that the asphalt was actually laid by military personnel, due to circumstances subsequently arising, nor the fact that the airport was afterwards changed to a military airport can affect the Petitioner's right to full commercial rates for its transportation services.

CONCLUSION

For reasons hereinbefore stated, we respectfully submit that the judgment of the Circuit Court of Appeals for the 7th Circuit affirming the judgment of the District Court for the Western District of Wisconsin in so far as it dismissed Petitioner's claims arising out of the described shipments is erroneous and should be reversed.

Respectfully submitted,

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APPENDIX "A"

TRANSPORTATION ACT, 1940

PART II—Rates on Government Traffic.

GOVERNMENT TO PAY FULL RATES

Sec. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for less than such rate: *Provided further,* That Section 3709, Revised Statutes (U.S.C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed.

(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law.

DEDUCTION OF OVERPAYMENTS

Sec. 322. Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

APPENDIX "B"

Excerpt from House Report No. 1408, 78th Cong. 2d Sess. on Boren Bill— H. R. 4184.

"Conclusion and Recommendation."

"It is the conclusion of the committee that through the years the Government has gotten all and more than it bargained for in the original land-grant transaction. A statement issued by the General Land Office in 1941 summarized the situation by saying that in return for an 'empire of land' the Government got a transportation system that 'won the West and established a Nation stretching from the Atlantic to the Pacific Ocean.'

"Since that time, however, the Government has received as further and additional consideration on this deal land-grant deductions amounting to at least $500,000,000. The Committee is of the opinion that the time has come for the Government to close its books on this transaction.

"This conclusion is strengthened by the committee's examination of the actual working in practice of the land grant deduction system. It produces results inconsistent with our transportation policies. Businessmen must deal in the dark as to the rates paid by their competitors where Government contracts are involved, while there is discrimination in rates as among those shippers in position to take advantage of land-grant deductions and those not so situated.

"It is, therefore, the conclusion and recommendation of the committee that this bill to eliminate land-grant deductions should pass. Simple justice demands it; the public interest requires it.

"Among the desirable results to be expected from the enactment of the bill are the following:

"It will remove the discriminations under which industries now labor in competing for sales to the Government by placing them, so far as freight rates are concerned, in the same position with respect to such sales as they are with respect to transactions with private individuals and concerns.

"It will assure all shippers, agricultural and industrial, that their freight bills do not contain hidden taxes to make up for deficiencies in the charges paid by the Government on its traffic.

"It will result in relieving both the Government and the railroads of large expense by removing a source of unending controversy and litigation between them and by eliminating the necessity for an inordinate amount of accounting and other clerical work in connection with Government traffic.

"It will relieve the land-grant railroads of the injustice of being required to continue to make payments on a debt that was long since extinguished.

"It will relieve carriers that received none of the granted lands, including the motor carriers and water carriers as well as the great majority of the railroads, from the injustice of being compelled to reduce their charges on Government traffic in order to meet the competition of the land-grant lines.

"It will remove from the forwarders, which received no land grants, the threat of being required to submit to the land-grant deductions on Government traffic handled by them over land-grant lines.

"It will relieve the railroads of uncertainties as to their present revenues and thus enable them to plan more intelligently to meet the inevitable uncertainties of the future."